(2)

Supreme Court, U.S.
FILED
OCT - 1 1993
OFFICE OF THE CLERK

NO. 93-257

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

EDWARD RONWIN, d/b/a INDEX INVESTMENTS,

Plaintiff-Petitioner,

v.

SMITH BARNEY, HARRIS UPHAM & CO., INC., and JOHN SPAUSTAT,

Defendants-Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

F. JOSEPH WARIN
Kutak Rock
1101 Connecticut Avenue, NW
Washington, DC 20036-4374
(202) 828-2400

Counsel for Defendants-Respondents

BEST AVAILABLE COPY

23 pp

QUESTION PRESENTED

Whether this Court should review the decision below that affirmed the District Court's dismissal of Petitioner's claims seeking damages and an injunction to force Respondent, a securities broker-dealer, to provide Petitioner with a securities brokerage account without a predispute arbitration agreement.

LIST OF PARENT COMPANIES AND SUBSIDIARIES

Pursuant to Supreme Court Rule 29.1, a list of the parent companies and non-wholly owned subsidiaries of Respondent Smith Barney, Harris, Upham & Co., Inc. (which is now known as Smith Barney Shearson Inc.) is as follows:

Primerica Corporation (parent)

Smith Barney Shearson Holdings Inc. (parent)

Smith Barney Shearson Europe Holdings, Ltd. (non-wholly owned subsidiary)

Smith Barney Shearson Europe, Ltd. (non-wholly owned subsidiary)

Smith Barney Shearson Futures, Ltd. (non-wholly owned subsidiary)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 8

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Adams v. Merrill Lynch, Pierce, Fenner & Smith, 888 F.2d 696 (10th Cir. 1989) 13

Application of Ronwin, 113 Ariz. 357, 555 P.2d 315 (1976), *(en banc) cert. denied sub nom., v. Special Committee on Examinations and Admissions of the Arizona Supreme Court*, 430 U.S. 907 (1977), *and cert. denied sub. nom., Ronwin v. The Supreme Court of Arizona*, 439 U.S. 828 (1978) 3

David L. Threlkeld & Co. v. Metallgesellschaft Limited (London), 923 F.2d 245, 248 (2d Cir. 1991), *cert. dismissed*, ___ U.S. ___, 112 S. Ct. 17 (1991) 13

Federal Deposit Insurance Corp. v. Northwood Projects, Inc., 95 Misc. 2d 373, 407 N.Y.S. 2d 424 (1978) 12

Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F. Supp. 1505 (S.D.N.Y. 1985) 13

Gilmer v. Interstate/Johnson Lane Corp., ___ U.S. ___, 111 S. Ct. 1647 (1991) 12, 13

Hoover v. Ronwin, 466 U.S. 558 (1984) 3

In Re Matter of Ronwin, 136 Ariz. 566, 667 P.2d 1281 (1983) (*en banc*), *cert. denied sub nom., Ronwin v. Supreme Court of Arizona*, 464 U.S. 977 (1983) 3

In re Ronwin, 465 U.S. 1004 (1984) 3

In the Matter of Ronwin, 139 Ariz. 576, 680 P.2d 107 (1983), *cert. denied sub nom., Ronwin v. Supreme Court of Arizona*, 464 U.S. 977 (1983) 3

Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974) 11

Martin v. Equitable Life Assurance Society of the United States, 553 F.2d 573 (8th Cir. 1977) 12

McCrory v. Rapides Regional Medical Center, 635 F. Supp. 975 (W.D. La.1986), *aff'd sub mem.*, 801 F.2d 396 (5th Cir. 1986) 11

Muller Enterprises, Inc. v. Samuel Gerber Advertising Agency, Inc., 182 Neb. 261, 153 N.W.2d 920 (1967) 12

National Child Care, Inc. v. Dickinson, 446 N.W.2d 810 (Iowa 1989) 3

Pierson v. Dean Witter Reynolds, Inc., 742 F.2d 334 (7th Cir. 1984) 13

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 6, 8-10, 13

Ronwin v. Dunham, 818 F.2d 675 (8th Cir. 1987) . . . 3

Ronwin v. Fair Employment Practices Commission, 409 U.S. 811 (1972) 3

Ronwin v. Holohan, 479 U.S. 870 (1986) 3

Ronwin v. Piper, Jaffray & Hopwood, Inc., 113 Ill. App. 3d 687, 447 N.E.2d 954 (1983) 3

Ronwin v. Segal, 634 F.2d 636 (9th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981) 3

Ronwin v. Shapiro, 657 F.2d 1071 (9th Cir. 1981) 3

Ronwin v. Supreme Court of Iowa, 471 U.S. 1101 (1985) 3

Ronwin v. United States District Court for the District of Arizona, 469 U.S. 1132 (1985) 3

Ronwin v. Von Ammon, 688 F.2d 848 (9th Cir. 1982) 3

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 6, 8, 9, 11

Webb v. R. Rowland & Co., 800 F.2d 803, (8th Cir. 1986) 13

Wilko v. Swan, 346 U.S. 427 (1953) 9, 10

STATUTES

Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n 5, 7

Section 29 of the Securities Exchange Act of 1934, 15 U.S.C. § 78c 5, 7

CONSTITUTIONAL AMENDMENTS

Fifth Amendment 10

First Amendment 10

Fourteenth Amendment 10

ADMINISTRATIVE AGENCY ORDERS

H.R. 4960, 100th Cong., 2d Sess., 134 Cong. Rec. 4992 (1988) 14

Order Approving Proposed Rule Changes Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses, Securities Exchange Act Release No. 34-26805, 43 S.E.C. Docket 1250, 54 Fed. Reg. 21,144 (May 10, 1989) 14

NO. 93-257

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD RONWIN, d/b/a INDEX INVESTMENTS,

Plaintiff-Petitioner,

v.

SMITH BARNEY, HARRIS, UPHAM & CO., INC. and JOHN SPAUSTAT,

Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny Edward Ronwin's petition for writ of certiorari seeking review of the opinion of the Court of Appeals for the Eighth Circuit. This case does not present any important issues of federal law that should be decided by this Court, nor does it raise any conflicts that need resolution.

STATEMENT OF THE CASE

Petitioner, Edward Ronwin, is no newcomer to this Court. His Complaint in this action is simply one more in a series of frivolous complaints that he has filed on his own behalf in courts across the country.[1]

---

[1] Mr. Ronwin has not only filed numerous frivolous suits on his own behalf, but he also has been chastised by the Arizona Supreme Court for doing so. The Arizona Supreme Court, sitting *en banc*, found Mr. Ronwin "not mentally able" to be admitted to the Arizona Bar, concluding in a lengthy opinion as follows:

> Ronwin has not established that he is mentally fit to practice law. Manifestations of improper conduct include the filing of unwarranted legal actions against numerous individuals connected with Ronwin's unhappy experience in applying for admission to the Arizona Bar. . . . The refusal to accept the finality of *Ronwin I*, followed by the filing of unwarranted, vexatious, and harassing actions constitutes grounds for denial of admission. We conclude further that applicant's use of intemperate, provocatory language and epithets; his lack of control, restraint and civility; and his custom of vilifying those who oppose him are all improper conduct for an attorney and constitute grounds for denial of admission.

In Re Matter of Ronwin, 136 Ariz. 566, 667 P.2d 1281, 1291 (1983) (*en banc*), *cert. denied sub nom.*, *Ronwin v. Supreme Court of Arizona*, 464 U.S. 977 (1983). *See In the Matter of Ronwin*, 139 Ariz. 576, 680 P.2d 107 (1983), *cert.*

(continued...)

As the facts are alleged in the Complaint, Ronwin attempted to open a margin securities account at Smith Barney, Harris, Upham & Co., Inc. ("Smith Barney"), a securities broker-dealer. Ronwin, who is an attorney, noted that the Smith Barney standard account agreement he was being asked to sign contained a predispute arbitration clause and he refused to sign the agreement. Certain Smith Barney personnel permitted Ronwin to open a cash securities account but not a margin account without a predispute arbitration

---

[1](...continued)
denied sub nom., *Ronwin v. Supreme Court of Arizona*, 464 U.S. 977 (1983); *Application of Ronwin*, 113 Ariz. 357, 555 P.2d 315 (1976) *(en banc)*, *cert. denied sub nom.*, *Ronwin v. Special Committee on Examinations and Admissions of the Arizona Supreme Court*, 430 U.S. 907 (1977), *and cert. denied sub. nom.*, *Ronwin v. The Supreme Court of Arizona*, 439 U.S. 828 (1978). *See also Ronwin v. Holohan*, 479 U.S. 870 (1986); *Ronwin v. Supreme Court of Iowa*, 471 U.S. 1101 (1985); *Ronwin v. United States District Court for the District of Arizona*, 469 U.S. 1132 (1985); *Hoover v. Ronwin*, 466 U.S. 558 (1984); *In re Ronwin*, 465 U.S. 1004 (1984); *Ronwin v. Fair Employment Practices Commission*, 409 U.S. 811 (1972); *Ronwin v. Dunham*, 818 F.2d 675 (8th Cir. 1987); *Ronwin v. Von Ammon*, 688 F.2d 848 (9th Cir. 1982); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981); *Ronwin v. Segal*, 634 F.2d 636 (9th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); *Ronwin v. Piper, Jaffray & Hopwood, Inc.*, 113 Ill. App. 3d 587, 447 N.E.2d 954 (1983); *National Child Care, Inc. v. Dickinson*, 446 N.W.2d 810 (Iowa 1989).

agreement, to which Ronwin agreed. However, several hours later, the resident manager and broker at Smith Barney for the account, Respondent John Spaustat, heard what had transpired and immediately contacted Ronwin to advise him that he would not allow even a cash account to be opened without a predispute arbitration agreement. Ronwin still refused to sign the arbitration agreement, so Smith Barney closed Petitioner's account and refunded the money he had deposited.

Several months later, Ronwin brought this suit alleging, in four counts that he is entitled to an unspecified amount of compensatory and punitive damages, as well as a permanent injunction barring Smith Barney from requiring a predispute arbitration agreement as a condition for accepting a customer account. Ronwin's Count I is a purported cause of action for "contract of adhesion," in which Ronwin alleges that he and other prospective customers of Smith Barney have been denied "the free choice of whether or not to agree to said predispute arbitration clause, whether for a cash or margin account, and den[ied] . . . the right to seek redress of grievances . . . in the Courts . . ., [thereby] constituting a contract of adhesion and/or an impermissible demand for same and said action by SB [Smith Barney] is against public policy, unenforceable and an unconscionable business tactic."

Ronwin alleges that, with the exception of "several brokerage houses [that] will accept cash only accounts without the predispute arbitration agreements," the entire securities brokerage industry demands predispute arbitration agreements as a condition for the extension of securities brokerage services."

In Count II, Ronwin alleges that the conduct of Smith Barney and Spaustat violated the "antiwaiver" provisions of Section 14 of the Securities Act of 1933, 15 U.S.C. § 77n, and Section 29 of the Securities Exchange Act of 1934, 15 U.S.C. § 78cc, which proscribe "any condition, stipulation or provision binding any person to waive compliance with any provision" of such Acts. Ronwin contends that these antiwaiver statutes protect his so-called "unfettered" right under those Acts to bring suit in the courts if he so chooses and to obtain a securities brokerage account without being required to sign a predispute arbitration agreement. Ronwin's Count III alleges breach of contract and Count IV alleges breach of fiduciary duty based on the same conduct as Counts I and II.

The District Court for the District of Nebraska dismissed Ronwin's Complaint, and the Court of Appeals for the Eighth Circuit affirmed in a one-paragraph opinion adopting the District Court's opinion. In dismissing Count I, the

District Court agreed that Smith Barney's predispute arbitration agreement was a contract of adhesion, but held that Ronwin had made no allegations showing that the contract was unconscionable, regardless of Ronwin's allegation that insistence upon such predispute arbitration clauses was an industry-wide practice. The District Court dismissed Count II on the ground that this Court's decisions in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989), and *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), had held that the jurisdictional provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934 did "'not impose any duty with which persons trading in securities must 'comply,'" whereas the antiwaiver provisions of those Acts only prohibited waiver of the substantive obligations of those Acts. Finally, the District Court dismissed Ronwin's Count III alleging breach of contract on the ground that the contract for Ronwin's cash account was terminable at will by Smith Barney, and the District Court dismissed Count IV on the ground that Ronwin, even assuming *arguendo* that a fiduciary duty had existed, had not alleged any circumstances that could constitute a breach of such duty.

In his Statement of the Case, Ronwin misconstrues the District Court's opinion in contending that the District Court

misstated his arguments on Counts I and II. The District Court correctly understood Ronwin's claims as disputing Smith Barney's refusal to provide him service unless Ronwin "unconditionally accept[ed]" the predispute arbitration clause and that Ronwin had refused to agree to such clause. Ronwin has conveniently ignored portions of the District Court's opinion, such as those that explained that Ronwin "seeks to have Smith Barney enjoined from requiring such clause as a prerequisite for accepting accounts . . . [, which clauses are] presented to a party on a take it or leave it basis. . ." and that "Ronwin alleges that the defendants' insistence upon the predispute arbitration clause was an attempt to impose a condition that violates Sec. 14 of the Securities Act of 1933 . . . and Sec. 29(a) of the Securities Exchange Act of 1934. . . ." *See* Appendix, at A-6 to A-9.

REASONS WHY THE PETITION SHOULD BE DENIED

The crux of Ronwin's claims is whether he has any right to compel Smith Barney to transact business with him on the contractual term he chooses—i.e., without a predispute arbitration agreement—when no statute, case law or agency regulation would require Smith Barney to agree to that term. Ronwin's claims are inconsistent with this Court's holdings in *Rodriguez* and *McMahon* and the federal presumption in favor of predispute arbitration agreements. Ronwin is urging this Court to fashion by "judicial legislation" a new law requiring a securities broker-dealer to provide brokerage services upon demand to all prospective customers without requiring that a predispute arbitration agreement be signed. Ronwin's "lobbying" efforts should properly be directed to Congress, the SEC or the appropriate self-regulatory bodies of the securities industry for the change in law or regulation he seeks.

Ronwin relies upon some language of this Court in the *Rodriguez* decision that he has taken out of context. When read in context, it is apparent that this Court's dictum in *Rodriguez* that "arbitration agreements . . . serve to advance the objective of allowing buyers of securities a broader right to select the forum for resolving disputes . . ." was not

intended to create a new substantive right for securities customers to be able to force securities broker-dealers to provide a securities account without a predispute arbitration agreement, as Ronwin contends.

In *Rodriguez*, this Court expressly overruled its own precedent in *Wilko v. Swan*, 346 U.S. 427 (1953), and held that securities customers who had signed a predispute arbitration agreement and had failed to meet the burden of proving that such agreement "resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'" had no "'right to select the judicial forum'" over arbitration. 490 U.S. at 479-84. This Court further held in *Rodriguez*, as it had similarly held in *McMahon*, that "the right to select the judicial forum" in the federal securities acts was not a "substantive" right subject to protection under the antiwaiver provisions of those Acts, but a mere "procedural" provision that could be waived. 490 U.S. at 481-82 & 486; *see* 482 U.S. at 228.

In contrast, taking Ronwin's strained interpretation of the one sentence of dictum in *Rodriguez* that he relies upon to its logical conclusion, this Court in *Rodriguez* instead reaffirmed, not overruled, *Wilko v. Swan*. Ronwin construes *Rodriguez* to hold—contrary to this Court's express language

in that case—that a securities customer has an unrestricted choice of a judicial forum over arbitration and that such right is a substantive right. Thus, Ronwin's interpretation makes this Court's opinion in *Rodriguez* internally inconsistent.

Ronwin clearly cannot transpose a procedural right to select a judicial forum into a substantive right, nor can he use a procedural right to impose a concomitant substantive duty upon securities broker-dealers. When the *Rodriguez* opinion is read as a whole, the only reasonable meaning that can be given to the dictum in *Rodriguez* upon which Ronwin relies is that this Court was merely employing the same language it had used in *Wilko* concerning a customer's "'right to select the judicial forum'" to make the point that the validity of arbitration agreements and arbitral forums it was recognizing in *Rodriguez* would allow customers' claims under the Securities Act of 1933 to be heard in an additional forum that had not previously been available.

Ronwin attempt to bolster his meritless statutory claim with constitutional arguments is futile. Although Ronwin made no constitutional claims in his Complaint, he now argues that the First, Fifth and Fourteenth Amendments support his position. Even if his constitutional claims could now be heard, it is black letter law that the requirements of the United States Constitution and its Amendments apply

only to governmental entities or officials, not private parties like Smith Barney or John Spaustat. *See, e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349-50 (1974); *McCrory v. Rapides Regional Medical Center,* 635 F. Supp. 975, 980 (W.D. La.1986), *aff'd sub mem.*, 801 F.2d 396 (5th Cir. 1986).

In sum, there is no legal or factual basis for Ronwin's assertion that the District Court's opinion, as approved by the Eighth Circuit, was contrary to any decisions of this Court.

Ronwin fares no better in contending that his "refusal to be 'maneuvered into' a predispute arbitration agreement'" somehow creates a reason for his petition to be granted by this Court. Apparently now viewing his claim for breach of contract under Count III as intertwined with his purported "contract of adhesion" claim in Count II, Ronwin relies upon this Court's language in *McMahon* that if a broker "maneuvers" a customer into a predispute arbitration agreement, that provides grounds for revoking such agreement under ordinary principles of contract law. Ronwin argues that his "refusal to be 'maneuvered into' such an agreement," combined with his insistence on his purported "right to choose a judicial forum," provides grounds for his breach of contract claim in Count III.

However, even if Ronwin could somehow overcome the fact that he lacks a substantive right to choose a judicial forum, Ronwin's arguments are contrary to well-established and uniform federal law.

As an initial matter, Ronwin cannot avoid the long-accepted precept that a contract without a fixed term is terminable at will. *See Martin v. Equitable Life Assurance Society of the United States*, 553 F.2d 573, 574 (8th Cir. 1977); *Federal Deposit Insurance Corp. v. Northwood Projects, Inc.*, 95 Misc. 2d 373, 407 N.Y.S. 2d 424, 426-27 (1978); *Muller Enterprises, Inc. v. Samuel Gerber Advertising Agency, Inc.*, 182 Neb. 261, 153 N.W.2d 920, 924 (1967).

Further, Ronwin has failed to allege any circumstances of fraud, mistake, coercion or other grounds cognizable under common law for the revocation of contracts generally. Ronwin was not only not "coerced or defrauded into agreeing to the arbitration clause," *see Gilmer v. Interstate/Johnson Lane Corp.*, ___ U.S. ___, 111 S. Ct. 1647, 1656 (1991), he freely exercised his choice *not* to sign any arbitration agreement. Smith Barney in turn freely and legally exercised its choice *not* to do business with Ronwin in the absence of a predispute arbitration agreement. Ronwin cannot distinguish his claim from the federal court

decisions that—although recognizing the securities industry's superior bargaining power and general practice of requiring predispute arbitration agreements as a condition for a customer account—have uniformly denied customers' claims that arbitration clauses included in nonnegotiable brokerage agreements constitute unenforceable contracts of adhesion. *See Finkle and Ross v. A.G. Becker Paribas, Inc.*, 622 F. Supp. 1505, 1511-12 (S.D.N.Y. 1985); *see also Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. at 1655-56; *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. at 483-84; *David L. Threlkeld & Co. v. Metallgesellschaft Limited (London)*, 923 F.2d 245, 248 (2d Cir. 1991), *cert. dismissed*, ___ U.S. ___, 112 S. Ct. 17 (1991); *Adams v. Merrill Lynch, Pierce, Fenner & Smith*, 888 F.2d 696, 700 (10th Cir. 1989); *Webb v. R. Rowland & Co.*, 800 F.2d 803, 807 (8th Cir. 1986); *Pierson v. Dean Witter Reynolds, Inc.*, 742 F.2d 334, 339 (7th Cir. 1984).

Ronwin cannot escape the fact that if an arbitration agreement, after being signed by a securities brokerage customer, is not found to be an unconscionable contract of adhesion under general contract principles despite having been a condition precedent to a securities account, then a broker-dealer's request that a customer sign the same arbitration agreement in the same circumstances obviously

cannot constitute an illegal request subjecting the broker-dealer to an injunction or damages. *See id.*

Significantly, both Congress and the Securities and Exchange Commission to date have specifically declined to enact the legislation or regulation prohibiting mandatory predispute arbitration agreements that Ronwin is improperly seeking from this Court. *See* H.R. 4960, 100th Cong., 2d Sess., 134 Cong. Rec. 4992 (1988); *Order Approving Proposed Rule Changes Relating to the Arbitration Process and the Use of Predispute Arbitration Clauses,* Securities Exchange Act Release No. 34-26805, 43 S.E.C. Docket 1250, 1265, 54 Fed. Reg. 21,144, at 21,154-55 (May 10, 1989)(the "SEC Order").

As Ronwin admits in his Complaint, several securities broker-dealers allow cash securities accounts to be opened without execution of a predispute arbitration agreement. *See* Complaint ¶ XVI; *see also* SEC Order, *supra*, 43 S.E.C. Docket at 1265. Since Ronwin does not like the terms on which Smith reasonably has decided to conduct its business, Ronwin, like the "millions of Americans" whom he asserts are similarly affected, can simply choose to open a securities account at any or all of the other securities broker-dealers that will accept cash securities accounts without a predispute arbitration agreement.

CONCLUSION

In sum, no valid reasons exist for this Court to grant Ronwin's petition for writ of certiorari. No important issues of federal law need to be decided by this Court. The District Court's well-reasoned opinion and the Eighth Circuit's affirmance were in complete accord with this Court's governing decisions. Likewise, no conflict exists among the Circuit Courts for this Court to resolve regarding any issue raised by Ronwin's petition.

Dated: October 1, 1993.

Respectfully submitted,

SMITH BARNEY, HARRIS, UPHAM & CO., INC., and JOHN SPAUSTAT,
Defendants-Respondents,

By Their Attorneys,
F. JOSEPH WARIN
KUTAK ROCK
1101 Connecticut Avenue, NW
Washington, DC 20036-4374
Phone (202) 828-2400
Fax (202) 828-2488

and

KUTAK ROCK
1650 Farnam Street
Omaha, Nebraska 68102
Phone (402) 346-6000
Fax (402) 346-1148